Lawyers' Statement on
Bush Administration's Torture Memos

TO: President George W. Bush
Vice President Richard B. Cheney
Secretary of Defense Donald Rumsfeld
Attorney General John Ashcroft
Members of Congress

This is a statement on the memoranda, prepared by the White House, Department of Justice, and Department of Defense, concerning the war powers of the President, torture, the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, and related matters. The Administration's memoranda, dated January 9, 2002, January 25, 2002, August 1, 2002 and April 4, 2003, ignore and misinterpret the U.S. Constitution and laws, international treaties and rules of international law. The lawyers who approved and signed these memoranda have not met their high obligation to defend the Constitution.

Americans have faith that our government respects the Constitution, the Bill of Rights, laws passed by Congress, and treaties which the United States has signed. We have always looked to lawyers to protect these rights. Yet, the most senior lawyers in the Department of Justice, the White House, the Department of Defense, and the Vice President's office have sought to justify actions that violate the most basic rights of all human beings.

The memoranda prepared and approved by these lawyers:

- Claim a power for the President as Commander-in-Chief to choose to ignore laws, treaties and the Constitution regarding the treatment of prisoners. (DOD memo, April 4, 2003).

- Advise the President that he has the authority to approve the infliction of extreme physical and mental distress by defining "torture" so narrowly as to exclude all but treatment that is "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." According to the Administration's memoranda, mental pain or suffering does not amount to torture unless "it results in significant psychological harm of significant duration, e.g., lasting for months or even years." (DOJ memo, August 1, 2002). This memo was reportedly prepared in order to provide legal bases and defenses for harsh methods already used by the CIA, in the event that CIA agents were prosecuted for violation of the federal anti-torture statutes.

- Assert the permissibility of the use of mind-altering drugs that do not "disrupt profoundly the sense of personality." According to the memorandum: "By requiring that the procedures and the drugs create a profound disruption, the statute requires more than that the acts 'forcibly separate' or 'rend' the senses or personality. Those acts must penetrate to the core of an individual's ability to perceive the world around him, substantially interfering with his cognitive abilities, or fundamentally alter his personality." (DOJ memo, August 1, 2002).

- Advise the President that despite concerns raised by the Department of State, the U.S. is exempt from compliance with the Geneva Convention on the Treatment of Prisoners of War with respect to the war in Afghanistan. (See White House Counsel Memo, January 25, 2002). This argument ignores that the treaty, by its own terms, governs all conflicts "at any time and in any place whatsoever," and protects even unlawful combatants who do not qualify as prisoners of war from "humiliating and degrading treatment" and "mutilation, cruel treatment and torture." (Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 3 para. 1). As stated by Attorney General John Ashcroft, the purpose of claiming an exemption from the Geneva Convention was to provide American intelligence, military and law enforcement personnel with a defense to charges relating to "field conduct, detention conduct or

interrogation of detainees" that is prohibited by the Geneva Convention. (Letter to the President, Feb. 1, 2002).

- Contrived defenses by distorting definitions of "necessity," "self-defense," and "superior orders" in order to avoid independent responsibility for actions that would violate the U.S. Army Field Manual and relevant statutory and case law. (DOJ memo, August 1, 2002; DOD memo, April 4, 2003).

These memoranda and others like them seek to circumvent long established and universally acknowledged principles of law and common decency. The memoranda approve practices that the United States itself condemns in its annual Human Rights Report. No matter how the memoranda seek to redefine it, torture remains torture. The belated repudiation of the August 2002 memorandum (which had been signed by Jay S. Bybee, then Assistant Attorney General, Office of Legal Counsel and now a Federal Judge) is welcome, but the repudiation does not undo the abuses that this memorandum may have sanctioned or encouraged during the nearly two years that it was in effect. The subsequent repudiation, coming after public outcry, confirms its original lawless character.

Moreover, the claim that the President's authority as Commander-in-Chief allows him to ignore laws, treaties, and the Constitution relevant to human rights, and thereby to shield those acting on his authority who violate domestic and international law by their interrogation methods and other behavior, directly contradicts several major Supreme Court decisions, numerous statutes passed by Congress and signed by Presidents, and specific provisions of the Constitution itself. One of the surprising features of these legal memoranda is their failure to acknowledge the numerous sources of law that contradict their own positions, such as the Steel Seizure Case, Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952). The unprecedented and under-analyzed claim that the Executive Branch is a law unto itself is incompatible with the rule of law and the principle that no one is above the law.

The lawyers who prepared and approved these memoranda have failed to meet their professional obligations. A lawyer has a duty both to ask his or her client what the client wants to do and assist the client in accomplishing his or her lawful objectives. But the lawyer has a simultaneous duty, as an officer of the court and as a citizen, to uphold the law. Enforcement of all of our laws depends on lawyers telling clients not only what they can do but also what they can not do. This duty binds all lawyers and especially lawyers in government service. Their ultimate client is not the President or the Central Intelligence Agency, or any other department of government but the American people. When representing all Americans, government lawyers must adhere to the Constitution and the rule of law. In fact, government lawyers take the following oath: "I . . . do solemnly swear (or affirm) that I will support and defend the Constitution of the United States…"

Conscientious leaders of the Department of Justice and lawyers in other governmental agencies have always striven to meet that standard. But some of those currently occupying senior legal positions in this Administration in this instance have abandoned this standard. They have counseled individuals to ignore the law and offered arguments to minimize their exposure to sanction or liability for doing so.

While the facts cited above are established, much, however, is still not known, for the Administration refuses to produce other memoranda and documents relating to treatment of prisoners and detainees. We therefore:

(1) Call upon the Administration to release all memoranda relating to such treatment and on Congress to require their production if they are not released; and

(2) Call for an appropriate inquiry into how and why such memoranda were prepared and by whom they were approved, and whether there is any connection between the memoranda and the shameful abuses that have been exposed and are being investigated at Abu Ghraib prison in Baghdad and at other military prisons.

Sincerely,

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